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In The

Supreme Court of the United States

October Term, 1995

PAUL SCHENCK, et al.,

Petitioners,

vs.

PRO-CHOICE NETWORK OF WESTERN NEW YORK, et al.,

Respondents.

On Writ Of Certiorari To The Court Of Appeals For The Second Circuit

BRIEF OF AMICI CURIAE, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF FLORIDA, INC., AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION, INC. AND INDIANA CIVIL LIBERTIES UNION IN SUPPORT OF NEITHER PARTY AND SUGGESTING REVERSAL

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. THE APPLICABLE STANDARD	4
II. THE FLOATING BUFFER ZONE AND CEASE AND DESIST PROVISIONS ARE INCOMPATIBLE WITH THE *MADSEN* STANDARD UNDER THE STATED FINDINGS OF THE DISTRICT COURT	7
A. The Appropriate "Significant" Government Interests	8
B. The Contested Injunction Provisions Fail to Meet the Proper Constitutional Standard	10
III. CLARIFICATION OF THE *MADSEN* STANDARD	12
CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES CITED:

Bray v. Alexandria Women's Health Clinic, 506 U.S. 267 (1993) 10

Califano v. Yamaski, 442 U.S. 682 (1979) 5

Carroll v. President & Commissioners of Princess Anne, 393 U.S. 175 (1968) ..... *passim*

City of Houston v. Hill, 482 U.S. 451 (1987)..... 13

Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978)..... 9

Cox v. Louisiana, 379 U.S. 536 (1965) 2

Gompers v. Buck's Stove & Range Co., 221 U.S. 418 (1911)..... 6

Madsen v. Women's Health Center, 114 S. Ct. 2516 (1994) ..... *passim*

Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1941).....2, 6, 10, 13, 14

NAACP v. Claiborne Hardware, 458 U.S. 886 (1982) 2, 3, 5, 7, 13, 14

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971)..... 2

Pro-Choice Network of Western New York v. Schenck, 67 F.3d 377 (2d Cir. 1995) 2, 3, 8, 9, 15

Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417 (W. D. N. Y. 1992) 6, 8, 9, 12, 15

Youngdahl v. Rainfair, 355 U.S. 131 (1957)..... 7

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONS:

First Amendment, United States Constitution 1, 2, 8, 12, 13

OTHER REFERENCES:

Freedom of Access to Clinics Entrance Act of 1994, 18 U.S.C. § 248..... 14

BRIEF FOR AMICI CURIAE

INTEREST OF AMICI

Amici are state affiliates of the American Civil Liberties Union in Florida, Ohio and Indiana. Each is a separately incorporated, non-profit public interest law organization devoted to protecting constitutional rights and civil liberties. Amici represent clients who have engaged in public protest activities and against some of whom injunctive relief is currently being sought by private parties seeking court-imposed restrictions on those protest activities. Those clients' interests and rights under the First Amendment may be impacted directly by the Court's decision in this case. Amici believe that the First Amendment analysis undertaken in the circuit court decision under review is inconsistent with the proper standards established by this Court, and if left uncorrected, could have a damaging effect generally on the rights of protesters well outside the particular controversy of abortion.

INTRODUCTION AND SUMMARY OF ARGUMENT

The grant of certiorari in this action contemplates a determination whether two provisions of a 1992 injunction issued by the United States District Court for the Western District of New York are consistent with the First Amendment. One contested provision of the injunction imposes a fifteen-foot "floating" buffer zone, which attaches not only to the entrances and driveways of clinic private property, but also to "any vehicle or person seeking access to or leaving such facilities," including non-

patients and non-health care providers. *Pro-Choice Network of Western New York v. Schenck*, 67 F.3d 377, 393 (2d Cir. 1995) (en banc) ("*Schenck*"). The second contested provision provides an exception to the buffer zone for up to two "sidewalk counselors" who may engage in "conversation of a non-threatening manner." These designated individuals must "cease and desist" and retreat outside the floating buffer zone, however, if a recipient of their message "wants to not have counseling, wants to leave, or walk away." 67 F.3d at 390.

These injunctive measures reflect novel and unwarranted exercises of judicial power limiting speech, imposed by the district court under an improper standard. In prior cases before this Court involving labor disputes, racial and civil rights disputes and student protests, restrictions on public protest activities have been tempered by careful fidelity to core First Amendment principles, even when speech has been accompanied by acts of violence, obstruction and threats. *See, e.g., Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287 (1941); *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175 (1968); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982); *cf. Cox v. Louisiana*, 379 U.S. 536 (1965). The Court's one decision addressing restrictions on an anti-abortion protest, *Madsen v. Women's Health Center*, 114 S. Ct. 2516 (1994), expressed its close adherence to the constitutional standards established in these earlier cases. 114 S. Ct. at 2526.

Because *Madsen* permitted imposition of a buffer zone at an abortion clinic, however, the decision may have spawned exceptions to the *Milk Wagon/Carroll* line of

precedent that the Court did not intend.[1] Here, for example, the Second Circuit – nominally applying *Madsen* – upheld the district court's injunction under an analysis which broadly extends captive-audience doctrine to traditional public fora and which transforms unwanted verbal messages into a "constructive blockade" meriting injunctive relief. *See Schenck*, 67 F.3d at 383 and 393. These interpretations of *Madsen* border on *de facto* content-based restrictions, and if left uncorrected, could have chilling consequences well beyond the abortion protest context. The Second Circuit's decision provides a strong indication that the standard articulated for injunctions in *Madsen*, 114 S. Ct. at 2525 ("burdens no more speech than necessary" to serve a significant government interest), without more, furnishes insufficient guidance to ensure First Amendment standards are applied in the anti-abortion protest context in a manner consistent with other, equally divisive public protest contexts noted above.

The Court should clarify that, under *Madsen*, an injunction is *not* narrowly tailored to "burden no more speech than necessary" to serve a significant government interest unless "the essential needs of the public order" are at stake and the injunctive decree is "couched in the

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[1] Significantly, the decision in *Madsen* was premised "on the *assumption* that the evidence and testimony before the [trial] court supported its findings . . . ", since the petitioners in that case never certified the factual record on appeal. 114 S.Ct. at 2527-28 (emphasis added). The Court in that case strictly refrained from engaging in the independent review of the record it ordinarily undertakes in cases involving the First Amendment. *See, e.g., NAACP v. Claiborne Hardware*, 458 U.S. at 915-16 n. 50.

narrowest terms that will accomplish the pin-pointed objective." *See Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. at 183. Consistent with this standard, judicial power creating a buffer zone should be exercised only when the plaintiffs have stated a proper cause of action against the defendants; a prior injunction, applying only to unlawful conduct, has failed to contain the unlawful activity; the defendants' unlawful activity pervasively threatens the public order; the order allows retention of fundamental free speech rights in each location; and the order is narrowly tailored so that any speech-related restriction has an articulated and direct relation to the curbing of unlawful conduct.

Amici believe that, when tested fairly against these standards, the two injunctive provisions at stake in this case are unnecessarily restrictive. Particularly since the Second Circuit chose to apply *Madsen* standards *post-hoc* to a pre-*Madsen* order constructed by the district court under a "reasonable time, place and manner" standard, it would be proper for this Court, after clarifying the proper standards, to remand the case for an initial determination by the district court under those standards, in view of a trial judge's discretionary role in fashioning injunctions.

ARGUMENT

I. The Applicable Standard

In *Madsen v. Women's Health Center*, 114 S. Ct. 2516, 2525 (1994), this Court adopted the following applicable

standard: "Whether the challenged provision of the injunction burdens no more speech than necessary to serve a significant government interest." The Court observed that " 'injunctive relief should be no more burdensome to the defendants than necessary to provide complete relief to the plaintiffs.' " 114 S. Ct. at 2525 (*quoting Califano v. Yamaski*, 442 U.S. 682, 702 (1979)). Citing *NAACP v. Claiborne Hardware*, 458 U.S. at 916 and *Carroll v. President and Comm'rs Princess Anne*, 393 U.S. at 183-84, the Court further noted that "when sanctionable 'conduct occurs in the context of constitutionally protected activity . . . ' 'precision of regulation is demanded.' " *Id.* Significantly, the Court stressed that the standard articulated in *Madsen* is the functional equivalent of *Carroll's* requirement that an injunction be "couched in the narrowest terms that will accomplish the pin-pointed objective" of the injunction. *Madsen*, 114 S. Ct. at 2526 ("We fail to see a difference between the two standards.")

The standard adopted in *Madsen* reflects a conception that neither the state nor private parties "ordinarily" should rely on injunctions to serve their interests in regulating abusive expression. Such injunctions come to the Court "bearing a heavy presumption against constitutional validity." *Carroll*, 393 U.S. at 181. Although not content-based *per se* (*Madsen*, 114 S. Ct. at 2523-24), such injunctions nonetheless are directed specifically against particular speakers, organizations, and protests, and reflect judge-created norms untethered from a more broad-based legislative process. *See Madsen*, 114 S. Ct. at 2424 ("Injunctions carry greater risks of censorship and discriminatory application than do general ordinances.") They also can be enforced through civil proceedings,

without jury trials or a criminal standard of proof. *See generally Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 426-27 (1911).

As a consequence, and as the Court has taken pains to emphasize in the past, only the most exceptional circumstances warrant imposition of governmental authority to curb speech:

> [T]he right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force . . . [The] protestor's right to free speech in the future cannot be forfeited because of dissociated acts of past violence. Nor may a state enjoin peaceful picketing because it may provoke violence in others.

Milk Wagon Drivers, 312 U.S. at 293 and 296.[2] The Court subsequently has stressed that a ban on otherwise lawful, peaceful expressive activity can be justified only where "a

[2] *Milk Wagon Drivers* provides a paradigm of when an injunction curbing speech activities may be appropriate. There, the court documented "violence on a considerable scale," including "more than fifty instances of window-smashing; explosive bombs causing substantial injury . . . ; [five] stench bombs," several wrecked trucks, arson of a store and two trucks, severe beatings of a store-keeper, a trucker and workers, one shooting and a number of threatened shootings. 312 U.S. at 291-92. The conduct described by the district court in this case does not appear to rise to the level of violence encountered in *Milk Wagon Drivers*. *Compare Pro-Choice Network v. Project Rescue*, 799 F.Supp. 1417, 1424 (W.D.N.Y. 1992) ("[D]emonstrators crowd around people trying to enter the facilities . . . and grab, push and shove the patients, patient escorts and staff.")

pattern of violence was established which would inevitably reappear in the event picketing were later resumed." *Youngdahl v. Rainfair*, 355 U.S. 131 (1957) (declining to permit ban on peaceful picketing under *Milk Wagon Drivers* because "[w]hat violence there was was scattered in time and much of it was unconnected with the picketing"); *NAACP v. Claiborne Hardware*, 458 U.S. at 923, 924 n.67 ("this case is not like *Milk Wagon Drivers* . . . in which the Court held that the presence of violence justified an injunction against both violent and nonviolent activity. The violent conduct present in that cases was pervasive . . . [T]he injunction must be modified to restrain only unlawful conduct . . . ").[3] *Cf. Carroll*, 393 U.S. at 180 (speech loses "the broad guarantee of the First Amendment" only in those "special, limited circumstances in which speech is . . . interlaced with burgeoning violence.").

II. The Floating Buffer Zone and Cease and Desist Provisions are Incompatible with the *Madsen* Standard Under the Stated Findings of the District Court

The district court in this case created a floating fifteen foot buffer zone using a "reasonable time, place and manner" standard of analysis. Coupled with the cease and desist provision of the injunction, the "floating"

[3] Instructively, *Claiborne Hardware* characterized past unlawful acts (including shots fired at several homes, a brick thrown through a windshield, two beatings and damage to private property) as "isolated acts of violence during a limited period." 458 U.S. at 924.

nature of the buffer zone effectively imposes on protestors a thirty foot swath around each individual and vehicle entering a clinic, without beginning and without end. The Second Circuit upheld these restrictions, relying in part on a rationale that persons in a public forum seeking access to an abortion clinic are a captive audience who should be free from unwanted speech. *Schenck*, 67 F.3d at 392. The Second Circuit's analysis reflects misapplication of the *Madsen* standard.[4]

A. The Appropriate "Significant" Government Interests

The district court identified three governmental interests underlying the injunction: (1) protecting the health and safety of patients; (2) securing public safety by preventing physical blockades and preventing defendants from "abusing, grabbing, touching, pushing, shoving or crowding persons entering or leaving the clinics[;]" and (3) "ensuring 'that the constitutional rights of one group are not sacrificed in the interest of the constitutional rights of another.' " *Pro-Choice Network v. Project Rescue*, 799 F. Supp. 1417, 1433 (W. D. N. Y. 1992). The Second

[4] For purposes of First Amendment analysis, it is particularly important in the abortion context that, without minimizing the very grave and abhorrent violent acts that have occurred at some clinics, courts resist ascribing the motivations and tactics of individuals committing those acts to all organized and active protest against abortion activities. As with any social protest movement, be it in areas of labor, civil rights, or anti-war efforts, abortion protestors hold wide disparities in beliefs about appropriate speech, conduct and tactics.

Circuit accepted these interests as "significant." 67 F.3d at 387.

The significance of the second government interest appears uncontroversial, but the first proffered interest warrants careful examination by the Court. While protecting the health and safety of its citizens is of course a strong government interest in the abstract, a too-easy acceptance that health and safety concerns are a "significant" government interest under *Madsen* opens the door to a new form of heckler's veto advanced in the guise of medical gloss. The recipient of an uncomfortable or unwanted message need only provide medical testimony that exposure to that message could adversely affect his or her physical or mental health in order to enjoin the speech at issue. For example, a business owner with high blood pressure could banish labor picketers to a large buffer zone because of the potential health-related consequences of hearing the picketers' taunts. A midwestern community with a large population of elderly concentration camp survivors could restrict a planned neo-Nazi march based on evidence of mental and physical medical risks presented by such speech. *Cf. Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

In this case, the district court's findings concerning increased health risks to patients stemming from petitioners' demonstration activity are notably unquantified and hypothetical. *See Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1427 (finding increased stress and anxiety "can" cause patients to have elevated blood pressure, hyperventilate, require sedation, require counseling, and become agitated, thereby "increasing the risks associated with surgery," but not specifying what or how serious

those risks are). While the health risks may very well be quantifiable and real, such concerns should not assume the mantle of a "significant" government interest warranting restrictions on fundamental rights of free speech without particularized evidence and findings of a clear and present danger of serious medical harm by the trial court. Otherwise, as in the decision below, "the guarantees of the Bill of Rights [may] be defeated by insubstantial findings of fact screening reality." *Milk Wagon Drivers*, 312 U.S. at 293.[5]

B. The Contested Injunction Provisions Fail to Meet the Proper Constitutional Standard

In *Madsen* this Court struck as unconstitutional the functional equivalent of the floating buffer zone imposed by the district court in this case. That provision restrained protestors from physically approaching any person seeking abortion services within three hundred feet of the clinic. 114 S. Ct. at 2529. Similar to the "bubble" provision in *Madsen*, which was instituted to prevent patients from being "stalked" and "shadowed", 114 S. Ct. at 2529, the buffer zone, coupled with the cease and desist provisions

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[5] The third proffered government interest appears misconceived, insofar as this case, properly understood, does not involve a balancing of constitutional rights. A private party's attempts to prevent individuals from performing or undergoing abortions does not violate any provision of the Constitution. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 267-78 (1993). The only potential constitutional violations in this action inhere in the speech restrictions imposed by the lower federal courts.

in this case, fails to meet the proper constitutional standard under *Carroll* and *Madsen*.

The floating buffer zone broadly restricts speech directed to individuals who are neither patients nor health care providers. Its thirty foot swath effectively prevents protestors from conversing with and presenting written material to other individuals in a non-obstructive and non-threatening manner.[6] Permitting two sidewalk counselors to breach the floating buffer zone does not meaningfully ameliorate this significant restriction on the speech of all other protestors.

The "sidewalk counselor" provision more egregiously sweeps protected speech into its prohibition, and can effectively suppress all dialogue, without serving any significant government interest. Instructively, this Court noted in *Madsen*:

> Absent evidence that the protestors' speech is independently proscribable (i.e. 'fighting words' or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, [the provision prohibiting demonstrators from physically approaching patients unless invited to do so] cannot stand.

114 S. Ct. at 2529. Yet, in this case – even when 'fighting words' or threats of violence are wholly absent – any recipient of a sidewalk counselor's message can subjectively transform pure speech into impermissible conduct,

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[6] Ironically, by keeping demonstrators so far back they must raise their voices to be heard, it also undermines the more polite level of political discourse the provision apparently is intended to advance.

exposing the sidewalk counselor to possible arrest and detention, by "indicat[ing], either verbally or non-verbally, that they do not wish to be counseled." *Pro-Choice Network*, 799 F. Supp. at 1434. Such a provision hardly bears material distinction from the provision struck in *Madsen* prohibiting all uninvited approaches of persons entering a clinic. *See Madsen*, 114 S. Ct. at 2529.

The district court acknowledged the substantial speech interest protestors have in conversing with and offering written material to patients. *Pro-Choice Network*, 799 F. Supp. at 1432. ("There is no question that defendants' activities constitute a form of political speech protected by the First Amendment. Defendants are entitled to express their views on abortion, 'particularly when standing on a public sidewalk where, since time immemorial, the authority to regulate speech is sharply restricted.' ") (citations omitted). But it erroneously concluded that these interests were adequately accommodated by its provision permitting only two protestors to approach the patient to converse and offer literature. 799 F. Supp. at 1434 ("In an attempt to accommodate fully defendants' First Amendment rights, the Court . . . has made an exception to the 'clear zones' for sidewalk counselors."). By limiting the number of sidewalk counselors, the court substantially and unnecessarily burdened the speech interest of all other protestors.

III. Clarification of the *Madsen* Standard

The infirmities of the present injunction suggest that the standard enunciated in *Madsen* needs clarification in order to instruct federal courts on adequately protecting

free expression rights in injunctions restricting protest. Several principles are suggested by the Court's own injunction cases, by First Amendment principles, and by the *Madsen* and *Carroll* standards themselves.

First, there should be no injunction without an express finding that the plaintiffs have stated a valid cause of action against the defendants who are to be restricted by the injunction. Injunctions are remedies to be imposed when a cause of action is proven or has a probability of success, and are not an opportunity for free-wheeling judicial activism seeking to promote social order. "The First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive." *City of Houston v. Hill*, 482 U.S. 451, 472 (1987).

Second, except in the "flagrant violence" situation, *see Milk Wagon Drivers*, any injunction should ordinarily be limited, in the first instance, to restraining illegal conduct. *NAACP v. Claiborne Hardware*, 458 U.S. at 924 n.67. If and only if that restraint fails to curb the illegal conduct is there any basis at all for believing that a broader injunction is necessary. Moreover, an incremental and location-specific approach should be required. The continuation of certain illegal conduct after an initial injunction would not justify a speech-restricting injunction that controls conduct of a different kind or in a different location.

Third, only where controlling the unlawful conduct at issue is "essential to public order," *Carroll*, 393 U.S. at

183, can circumstances justify an injunction impinging on legitimate expressive activity. Thus, only activity that is pervasively threatening to the safety of others can provide the necessary predicate. Even if the district court here legitimately found such a predicate, which appears doubtful in view of the comparative predicates found in *Milk Wagon Drivers* and *Claiborne Hardware*, it is questionable whether the same injunctive relief properly should have been upheld by the Second Circuit, applying *Madsen* in 1995. In the interim, the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248 ("FACE"), proscribing "force," "threat of force" and "physical obstruction" at abortion clinics was enacted. By adding federal law enforcement capabilities, as well as draconian punishments, the FACE Act reduced, and perhaps eliminated, the earlier predicate for injunctive relief that ordinary remedies at law are inadequate. The district court on remand should consider the need for continued injunctive relief in light of the FACE Act.

Fourth, to be "tailored as precisely as possible to the exact needs of the case," *Carroll*, 393 U.S at 184, each aspect of any injunction that affects speech activity should do so in measured increments and to the least degree necessary for eliminating intolerable unlawful conduct underlying the injunction. In particular, the physical area covered by any restriction on communicative activity should be as confined as possible and based on site-specific justifications. Absent the type of extreme and pervasive violence found present in *Milk Wagon Drivers*, peaceful expressive activity should not be entirely forbidden within any area. In this case, the

injunction upheld by the Second Circuit applies in blanket fashion to seven clinics, and is not remotely tailored to specific clinics or justified by specific acts indicating a probability of actual or continued unlawful conduct at each of the sites.

Lastly, any injunction issued as a result of unlawful conduct should carefully limit provisions affecting speech to be narrowly responsive to the pervasive unlawful conduct that triggers its issuance. In other words, a direct, articulable nexus must exist between each speech-related restriction and the need to curb unlawful conduct. The fact that some petitioners engaged at one time in some unlawful, enjoinable conduct should not be an adequate predicate for a wide-ranging injunction on expressive activity by them and others.

Here, the district court found that Project Rescue had in fact complied commendably with the TRO issued earlier in the case. *Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1424 n.5. Therefore, logically there could be no reasonable finding that the institution of a floating buffer zone was necessary to prevent future illegal activity. The Second Circuit sidestepped this peculiar absence of a key predicate for an injunction by merging *both* past illegal activity of protestors and their protected speech into the rubric of a "constructive blockade" having "the same goals as the physical blockades." *Schenck*, 67 F.3d at 382-83. This concept transforms speech into conduct by virtue simply of the speech's content or the speaker's purpose, and dangerously implies that public fora are

reserved only for tepid debates rather than divisive moral and political issues.[7]

CONCLUSION

The judgement of the circuit court should be reversed.

Respectfully submitted,

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[7] The lower courts in this action appeared to be of the view that the petitioners' purpose of deterring patients and staff from entering a clinic was itself improper, at least if it ever succeeded. If so, their notion of a "constructive blockade" would revolutionize First Amendment law if it were applied to picket lines conducted by labor unions, economic boycotters, or any number of other groups. One of the ordinary purposes of a picket line is to dissuade people from crossing it, and success in that purpose is a *vindication*, not a violation, of the First Amendment unless accomplished by physical force or threats.